district court lacked jurisdiction and, secondly, remand is normally to a state court which clearly has jurisdiction to decide the case." *Glenmede Tr. Col v. Dow Chem. Co.*, 384 F.Supp. 423, 433–34 (E.D. Pa. 1974).

DISCUSSION

A. Removal Was Procedurally Proper

First, the Court should determine whether removal was procedurally proper. When a case is removed, "all defendants who have been properly joined and served must join in or consent to the removal of the action" within thirty days after service. 28 U.S.C. § 1446(b)(2)(A), (B). Here, Plaintiffs argue that Johnson Contracting's failure to confirm consent to removal within the thirty-day period after Defendants filed the Notice of Removal is an incurable procedural defect that bars removal. [*See* Docket No. 26.] However, courts in this district have allowed parties to consent to removal even after the removal period has ended so long as the delay in obtaining consent is not egregiously late and there is sufficient indication that consent has been provided. *Michalak v. ServPro Indus., Inc.*, No. CV 18-1727 (RBK/KMW), 2018 WL 3122327, at *5 (D.N.J. June 26, 2018) (explaining that the court "refrain[ed] from applying the standard in a hyper-technical and unrealistic manner"); *Canon Fin. Servs., Inc. v. Kalmus*, No. 119CV20919 (NLH/KMW), 2020 WL 4333744, at *3 (D.N.J. July 28, 2020) (holding that remand on the basis for failure to obtain consent was unwarranted when codefendants provided clear notice of their consent days after plaintiff suggested lack of clarity on the issue).

Here, Johnson Contracting confirmed its consent to removal multiple times on the docket, and expressly clarified that it consented to removal prior to Union Defendants' application for removal. [Docket. No. 12.] Furthermore, Johnson Contracting's initial written correspondence confirming that it consented to removal was filed only thirty-one days after Union Defendants

filed the Notice of Removal. [Docket Nos. 1, 10.] The Court should note that the timing of Johnson Contracting's consent was not egregiously late after the Notice for Removal was filed. Plus, it unambiguously expressed to the Court that it consented to removal at the outset, and the Court should be mindful of Johnson Contracting's efforts to clarify to the Court when it consented to removal—a representation the Court can fully expect to have been in good faith. Thus, the Court should find that the Defendants have met the procedural requirements for removal.

B. Removal Was Substantively Improper Since Plaintiffs' Claims Are Not Preempted by Federal Law

In certain cases, a complaint that presents only state-law claims and no other basis for federal jurisdiction may nonetheless be removed to federal court pursuant to the doctrine of complete preemption. *See Pascack Valley Hosp., Inc. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 399 (3d Cir. 2004) (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004)). Complete preemption "recognizes that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Pascack*, 388 F.3d at 399 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987)). However, the Court should not find that Plaintiffs' narrowly pled claims in this action concern any such area of federal law.

1. The LMRA Does Not Preempt Plaintiffs' Claims

a. Section 301 of the LMRA

The Court should rule that Section 301 of the LMRA does not completely preempt Plaintiffs' claims as none of the state-law claims are so inextricably intertwined with the collective bargaining agreement ("CBA") between the Regional Division of the Central New

Jersey Chapter, National Workers Organization and Local Workers Union. [*See* Docket No. 1-4.] In other words, to decide Plaintiffs' claims, the Court need not interpret any parties' rights created by the CBA, or substantially dependent, on the CBA.

Section 301 gives federal courts the exclusive jurisdiction to hear "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). Section 301 also preempts claims that involve rights granted to employees created by a CBA or rights that are "substantially dependent" on a CBA. *Caterpillar Inc.*, 482 U.S. at 491; *Rutledge v. Intl Longshoremens Assn AFL-CIO*, 701 F. Appx 156, 160 (3d Cir. 2017). A state-law claim is also preempted by Section 301 of the LMRA if it is so "inextricably intertwined" with the terms of a labor contract that its resolution requires judicial interpretation of those terms. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

However, state-law claims with no other relationship to a CBA beyond the fact that they are asserted by an individual covered by a CBA are not preempted by Section 301. *See Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for S. Cal*., 463 U.S. 1, 25 (1983) (explaining that "…we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section.") Where a claim only tangentially involves a provision of the CBA, the state-law claim is not preempted. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). If the rights created by state law can be enforced without resorting to the interpretation of terms of a labor contract, Section 301 does not preempt a claim based on those rights. *See Caterpillar*, 482 U.S. at 391.

Here, the resolution of Plaintiffs' claims does not require the Court to construe any particular term of the applicable CBA. At best, Plaintiffs' claims only tangentially relate to the subject matter discussed in the CBA. Union Defendants argue that all of Plaintiffs' state-law

claims are completely preempted by the LMRA § 301 such that they may properly be removed to federal court. First, Plaintiffs' tortious interference, defamation, and trade libel claims are based on rights created by state tort law, not the CBA. In addition, Union Defendants refer to large sections of the CBA and quote portions that are only tangentially related to the claims or go beyond Plaintiffs' Complaint completely.

Specifically, Union Defendants assert that Plaintiffs' Complaint alleges breaches of Articles II and IV of the CBA, which comprises approximately thirteen single-spaced pages of complex provisions in the CBA. [Docket Nos. 1 ¶¶ 11–12, 1–4.] Union Defendants maintain that the tortious interference with contractual relations claim is based upon the allegation that Union Defendants "wrongfully refused to provide appropriate manpower," and impeded its efforts to timely complete work on various projects. [Docket No. 24, at 17–19.] Furthermore, Union Defendants broadly assert that the obligation to provide manpower is founded upon the rights and obligations created in the CBA. [*Id.*]

As to the tortious interference with prospective economic advantage claim, Union Defendants broadly cite to referral procedures in the CBA that are allegedly relevant to Mr. Smith. [*Id.* at 20–21.] While Union Defendants can point to large portions of Article IV referral procedures, it fails to demonstrate that resolution of Plaintiffs' tortious interference claims is substantially dependent upon those terms or require the Court's interpretation of any such contractual provision. The tortious interference claims are based on the actual and prospective contractual relations that Union Defendants allegedly interfered with when it disclosed Plaintiff's bid to Johnson Contracting, berated Plaintiff's project manager to withdrawal from the Plaintiff's project and misrepresented all Plaintiffs. The central contention is not over the precise terms of the bidding process, referral procedure, or "manpower" provided. [Docket No. 24, at 23–26.]

Furthermore, Union Defendants argue that Plaintiffs' claims of defamation and trade libel require an analysis of the CBA and allege breaches of the CBA. Specifically, Union Defendants contend that Articles VI through VIII of the CBA contain several provisions providing that an employer will "contribute a percentage of the gross monthly payroll for all employees to [specific Local Union Workers Funds] as outlined on the current wage sheet" and define "gross labor payroll". [Docket No. 24, at 28.] Union Defendants do not identify any specific provisions that have anything to do with Mr. Smith's ability to acquire a job or Union Defendants right to defame Plaintiffs. Broadly reciting large sections of the CBA or tangentially related terminology from the CBA will not suffice.

In determining whether Plaintiffs' claims are preempted by Section 301, *Hudson Yards,* a case that dealt with similar tortious interference claims related to third-party contractual relationships, is fairly instructive. *See Hudson Yards Constr. LLC v. Bldg. & Constr. Trades Council of Greater N.Y.*, No. 1:18-CV-2376-GHW, 2019 WL 233609 at *3-4 (S.D.N.Y. Jan. 15, 2019). In *Hudson Yards*, as is the case here, "none of the allegedly defamatory statements [made by Union Defendants] even mentions the [CBA]." *Hudson Yards Constr. LLC*, 2019 WL 233609 at *4. Moreover, the defendants in *Hudson Yards* comparably failed "to demonstrate that in order to determine the defamatory nature of the conduct alleged, that any provision of the [CBA] would need to be interpreted, much less that the defamation claim is somehow 'substantially dependent' on the terms of the [CBA]." *Id.* Thus, Section 301 similarly does not completely preempt any of Plaintiffs' state-law claims. The Court could easily discern from the face of the Complaint that all of the state-law claims asserted therein are narrowly drafted and do not require the interpretation of any particular contractual language or provision of the applicable CBA.

Union Defendants are not able to amend the Complaint to change this or assert new causes of action against themselves not pled in the Complaint.

Simply put, Plaintiffs are the master of their complaint, and the Court should reject Union Defendants' convoluted argument attempting to broaden Plaintiffs' state-law tort claims, none of which require the Court to interpret any specific provision in the CBA. Union Defendants' inability to point to any disputed contractual provision in the CBA requiring the Court's interpretation is fatal to their argument that Section 301 of the LMRA preempts any of Plaintiffs' claims.

2. ERISA Does Not Preempt Plaintiffs' Claims

Union Defendants' final argument for removal concerns Sections 502 and 514 of ERISA. Congress enacted ERISA to comprehensively regulate employee welfare benefit plans that "through the purchase of insurance or otherwise, [provide] medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment..." 29 U.S.C. § 1002(1). "[I]t is important to distinguish complete preemption under Section 502(a) of ERISA, which is used in this sense as a jurisdictional concept, from express preemption under Section 514(a) of ERISA, which is a substantive concept governing the applicable law." *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999). Although Section 514(a) preempts state law claims that "relate to" an ERISA plan, Section 514 simply governs the law that will apply to the state-law claims, irrespective of the forum. 29 U.S.C. § 1144(a); *Lazorko v. Pa. Hosp.*, 237 F.3d 242, 248 (3d Cir. 2002). Therefore, Section 514(a), standing alone does not confer subject matter jurisdiction. *See Joyce v. RJR Nabisco Holdings Corp.*, 126 F.3d 166, 171 (3d Cir. 1997).

A defendant must first demonstrate that ERISA completely preempts a plaintiff's claim before the court can assume jurisdiction. *In re U.S. Healthcare, Inc.*, 193 F.3d at 160. "ERISA's

civil enforcement mechanism, Section 502(a), 'is one of those provisions with such extraordinary preemptive power that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule' and permits removal*." N.J. Carpenters & the Trs. Thereof v. Tishman Constr. Corp. of N.J.*, 760 F.3d 297, 303 (3d Cir. 2014) (citations omitted).

Union Defendants contend that ERISA completely preempts Plaintiffs' defamation claims such that they may be removed to federal court because the alleged false statements made to employees concerning wages and benefits owed are under an ERISA plan.[2] Applying the two-pronged *Pascack* test, the Court should consider (1) could the plaintiff have brought the claim under Section 502(a); and (2) does another independent legal duty support the plaintiff's claim. *Pascack Valley Hosp., Inc. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 400 (3d Cir. 2004). With respect to the first prong, the Court considers: "(a) whether the plaintiff is the type of party that can bring a claim pursuant to Section 502(a)(1)(B), and (b) whether the actual claim that the plaintiff asserts can be construed as a colorable claim for benefits pursuant to Section 502(a)(1)(B)." *Progressive Spine & Orthopaedics, LLC v. Anthem Blue Cross Blue Shield*, Civ. No. 17-536 (KM/MAH), 2017 WL 4011203, at *5 (D.N.J. Sept. 11, 2017) (emphasis in original). With respect to the second prong of the *Pascack* test, "a legal duty is 'independent' if it is not based on an obligation under an ERISA plan, or if it 'would exist whether or not an ERISA plan existed.' " *N.J. Carpenters*, 760 F.3d at 303 (quoting *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 950 (9th Cir. 2009)).

[2] Defendants allege that Sections 502 and 514 of ERISA preempts Plaintiffs' claims in its Notice of Removal [Docket No. 1-1 ¶ 13] but fail to address this argument in its opposition brief. Therefore, the Court should assume Defendants have abandoned this argument. Nevertheless, ERISA is also not a proper basis for removal here.

Here, Plaintiffs do not assert a colorable claim for benefits. There is no challenge to the type, scope, or provision of benefits under an ERISA plan. Plaintiffs' Complaint merely refers to published allegedly defamatory statements to Plaintiff's employees to "check their paystubs, Smith isn't paying in benefits" and accused Plaintiffs of violating fringe benefit contribution plans. This is not sufficient to meet the requirements under ERISA § 502(a)(1)(B). *See S.M.A. Med., Inc. v. UnitedHealth Grp., Inc.*, No. CV 19-6038, 2020 WL 1912215, at *8 (E.D. Pa. Apr. 20, 2020) (holding that plaintiff's claims for damages arose out of alleged misrepresentations and/or misinformation and did not derive from nor require interpretation of the language or terms of any patient's insurance claims).

Likewise, there are other legal duties that support Plaintiffs' defamation claim. Plaintiffs' defamation claim does not drive solely from the health plans administered or the benefits provided to employees under the plan, but were instead referenced in Union Defendants' allegedly defamatory publications. *See Jewish Lifeline Network, Inc. v. Oxford Health Plans (NJ), Inc.*, No. 15-CV-0254 SRC, 2015 WL 2371635, at *3-4 (D.N.J. May 18, 2015) (stating that "a state law claim may have an independent legal basis even if an ERISA plan is a factual predicate in the case") (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 512 U.S. 645, 656 (1995)). The Court should find that Union Defendants have failed to demonstrate that ERISA preempts Plaintiffs' state-law defamation claims.[3]

C. Judicial Estoppel

[3] Union Defendants argue that Plaintiffs' defamation claim requires the Court to interpret the CBA to determine the truth of the claims, an argument the Court should reject. However, this assertion also runs contrary to the well-pleaded complaint rule. *See Caterpillar, Inc.*, 482 U.S. at 392 ("The existence or possibility of a federal defense, including a defense that relies on the pre-emptive effect of a federal statute, does not confer federal question jurisdiction.") Defendants are unable to point to any federal authority that would preempt of Plaintiffs' defamation claim.

In sum, Union Defendants' attempts to inject federal questions into Plaintiffs' complaint are without merit. Plaintiffs are the master of their complaint and have chosen to plead only state-law tort claims narrowly. *See Int'l Assoc. of Fire Fighters v. City of Atl. City N.J.*, No. 17-725, 2017 WL 548941, at *2 (D.N.J. Feb. 10, 2017). Union Defendants cannot avoid state court by recharacterizing Plaintiffs' claims against them.

However, the Court should also take seriously Plaintiffs' repeated representations that the claims alleged in the Complaint have been narrowly written to implicate only state tort law. Plaintiffs have also represented that they do not intend to bring a related cause of action against Union Defendant arising under federal labor law or ERISA in this lawsuit. Plaintiffs are the master of the Complaint, but at the same time, Plaintiffs should not be permitted to forum shop or create further delay in this litigation from proceeding on the merits. In light of Plaintiffs' representations that its claims are limited to the state-law causes of action set forth in the Complaint, Plaintiffs will, no doubt, be judicially estopped by the New Jersey Superior Court from later asserting any related claim arising under Sections 301 or 303 of the LMRA, Section 8(b)(4) of the NLRA, or Sections 502 or 514 of ERISA.

CONCLUSION

Neither federal labor law nor ERISA likely preempt any of Plaintiffs' claims arising under New Jersey tort law, and as such, Defendants have failed to meet their burden to establish a basis for federal question jurisdiction. Accordingly, the Court should hold that removal is improper, and remand the matter back to state court.